

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LE v MINISTER FOR IMMIGRATION

[2006] FMCA 1289

MIGRATION – Partner (Residence) (Class BS) visa – review of decision of delegate – authorised recipient – where migration agent was authorised recipient – where migration agent left address.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.441A, 494B, 494C, 494D

Applicant: QUYNH ANH LE

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL AFFAIRS

File No: SYG 3135 of 2005

Delivered on: 25 August 2006

Delivered at: Sydney

Hearing date: 25 August 2006

Judgment of: Scarlett FM

REPRESENTATION

Solicitor for the Applicant: Mr Turner

Counsel for the Respondent: Mr McInerney

Solicitors for the Respondent: Phillips Fox

ORDERS

- (1) The title of the Respondent is changed to Minister for Immigration and Multicultural Affairs.

- (2) The Application is dismissed.
- (3) The Applicant is to pay the Respondent's costs fixed in the sum of \$6,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3135 of 2005

QUYNH ANH LE
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Respondent

REASONS FOR JUDGMENT

1. This is an application for a review of a decision of a delegate of the Minister. The Applicant seeks a review of the decision to refuse a visa application. The Applicant had sought a Partner (Residence) (Class BS) visa as a result of her marriage to her husband. She and the husband were married on 24th April 2001.
2. The application for permanent residence on partner grounds is a two stage process, and on 24th April the Department wrote to the Applicant saying:

I refer to your application for permanent residence based on partner grounds. Your application is ready for the second and final stage of assessment.
3. The letter set out a number of documentary requirements that needed to be shown. A form of Change of Address was provided to the Department, although it is clear that the document was not signed by the Applicant herself but by her husband. In my view, nothing turns on that.

4. What did happen was on 23rd June 2003 the Applicant completed a form of authorisation of a person to act and receive communication. That document, which clearly was signed by the Applicant, authorised one Robert George Johnstone to act for her. The form gave a post office box number for him, a landline telephone, a migration agent registration number, a facsimile number, an e-mail address, and clearly that document form, the Applicant's authorised address.
5. I have been referred to the provisions of s.441A of the Migration Act which sets out methods by which the Minister gives documents to a person, including dispatch by prepaid post or by other prepaid means, or transmission by fax, e-mail, or other electronic means.
6. Section 494D deals with authorised recipient. That says:

If a person, the first person, gives the Minister written notice of the name and address of another person, the authorised recipient, authorised by the first person to do things on behalf of the first person, that consist of or include receiving documents in connection with matters arising under this Act or the regulation, the Minister must give the authorised recipient, instead of the first person, any documents that the Minister would otherwise have given to the first person.

If the Minister gives a person a document by a method specified in s 494B, the person is taken to have received the document at the time specified in s 494C in respect of that method.

7. Sub-section 2 goes on to say:

If the Minister gives a document to the authorised recipient, the Minister is taken to have given the document to the first person. However, this does not prevent the Minister giving the first person a copy of the document.

8. It is quite clear, then, that under s.494D, giving the document to the authorised person is mandatory but there is no adverse consequence in giving a copy of that document to the Applicant, or to the first person.
9. The Applicant provided a statutory declaration on 23rd June, setting out her residential address in Queensland and setting out details of her relationship with her husband, Van Hieu Dang.

10. There are also other documents provided, including statutory declarations by supporting witnesses.
11. What then happened was that the Minister received on 9th December 2003 a document dated 8th December 2003 from the Applicant's husband. That letter said:

I, Mr Van Hieu Dang, and my wife, Mrs Anh Quynh Le. I would like to let you know that our relationship was finished, so our relationship is no longer continuing. Therefore, from now on I had no responsible anything about her, because we are not living together any more. Thank you very much! Yours sincerely!

12. When the document was received, or at some later stage, a person presumably employed in the Department has written the words:

Sponsorship withdrawn.

13. The delegate then wrote to the Applicant at the address of the authorised recipient, Mr Johnstone, on 11th December 2003. It is submitted, and I believe correctly, on behalf of the Applicant that this document does not comply with s.57 of the Migration Act, although it certainly complies with s.494D. The relevant part of the letter said:

This Department has received information indicating that you may no longer be living with your sponsoring partner, and that the relationship has ended.

14. The letter reminded the Applicant of the responsibility to notify the Department if there are any changes in her personal circumstances, including the ending of her relationship with a sponsor or a change of her address. The letter then asked the Applicant to provide information as to whether or not she wished to continue with the application.

15. The next thing that appeared to have happened is that the Minister's delegate sent an e-mail to the authorised recipient on 6th May 2004. That said, quote:

Dear Mr Johnstone. I refer to our letter dated 11 December 2003 requesting further information to enable processing of Ms Le's application for permanent residence to continue. As I have been unable to contact you via the telephone, would you please advise me if you are still acting on behalf of Ms Le.

16. That e-mail was not delivered. At page 91 of the Court Book there appears a copy of the delivery failure report.
17. The delegate wrote to the Applicant direct on 21st September 2004. That was at the address that she had given on her earlier documentation as 92 Irwin Terrace, Oxley, in the state of Queensland. That letter repeated the statement in the earlier letter that the Department had information that the applicant was no longer living in a genuine and continuing relationship with the nominating spouse.
18. The letter set out three circumstances in which an applicant may continue to be considered for the grant of a temporary or permanent visa on spouse grounds, despite the fact that the relationship has ended.
19. The letter asked the Applicant to provide certain documents to the Department within 28 calendar days. It set out what those departments were, and the letter ended up by saying, quote:

After the timeframe in which you are required to provide the documents has lapsed, I will proceed to decide your application on the basis of the information held on file at that time (unless, of course, you have indicated a reasonable time frame to seeking the required document).

20. The delegate then attempted to e-mail Mr Johnstone again on 25th October 2004, and again there was a delivery failure report.
21. On 26th October the delegate made a decision refusing the grant of a Partner (Residence)(Class BS) visa to the Applicant. The decision sets out background. It refers to two matters, one of which was telephone calls, but does not seem to be covered on any document. The decision says, quote:

On 9 February 2004, the case officer phoned the migration officer on the phone number nominated on the Form 956. The case officer was informed that the migration agent was no longer employed by the company, and that the company had discontinued dealing with migration matters.

22. The next paragraph which is relevant says, quote:

On 17 September 2004, the case officer contacted the Migration Agents Registration Authority (MARA) in an endeavour to locate

an address for the migration agent acting on behalf of the applicant. An officer from MARA informed the case officer that the migration agent's registration lapsed on 29 July 2004.

23. In the assessment the delegate looked at the criteria to be met, and found that the Applicant failed to satisfy the requirements of subclause 801.221(2)(b).

24. At page 101 of the Court Book the decision goes on to say, however, quote:

However, in situations where the relationship has ceased, legislation also provides for the grant of a permanent visa in certain limited circumstances. Those circumstances are:

- The death of the sponsor (subclause 801.221(5)), or*
- Where it is assessed that domestic violence has occurred in the relationship (subclause 801.221(6)(i), or*
- In the event that there is a child from the relationship and a Court has ruled that there are certain shared rights and obligations in respect of that child (subclause 801.221(6)(ii).*

25. The decision went on to say that:

As the applicant has not provided any information or evidence that would bring her within the scope of these limited circumstances, I find that the applicant does not satisfy subclauses 801.221(5) or (6).

Based on the available information and on my assessment above, I have decided to exercise my delegation under s.65 of the Migration Act 1958 as amended, and refuse to grant a Departure Residence Class BS Visa to Anh Quynh Le.

26. It appears clear from the pleadings that the Applicant was not made immediately aware of that. Indeed, the letter to the Applicant at her address in Oxley was returned unclaimed. A letter to the Applicant's authorised recipient, Mr Johnstone, at the post office box in Inala fared no better.
27. The Applicant in her amended application seeks a writ of certiorari quashing the decision of the Respondent, and an order that the decision

of the Respondent was made in excess of jurisdiction, and is null and void.

28. The grounds given are that the Applicant was denied procedural fairness, and particulars of that are that the Applicant was never advised of the Respondent's intention to refuse her visa application or cancel her visa.
29. What is submitted on behalf of the Applicant is that the delegate did not follow the requirements of the Migration Act. That in particular the delegate did not follow the requirement of s.494D of the Migration Act by posting the letters by prepaid post to the Applicant's authorised recipient.
30. In particular, whilst the letter of 11th December 2003, which appears at page 89 of the Court Book, seeking information from the Applicant care of the authorised recipient, was addressed to the Applicant in a way that conforms with s.494D, the letter to the Applicant of 21st September 2004, which it is conceded would comply with s.57 of the Migration Act, was not correctly addressed. That letter was addressed to the Applicant at the residential address that she had given, and not at the address of her authorised recipient.
31. The Respondent submits that this application lacks utility because at the time of decision the applicant had to satisfy the delegate that (a) she continued to be sponsored the grant of subclass 820 (Spouse) visa by the sponsoring spouse, and (b) that she was the spouse of the sponsoring spouse, and (c) two years have passed since the application was made, or (d) the sponsoring spouse had died and the Applicant would have continued to be the spouse of the sponsoring spouse if the sponsoring spouse had not died, or (e) the Applicant had suffered domestic violence committed by the sponsoring spouse, or (f) there was a child and the circumstances described in clause 801(5)(c)(i)(B), or clause 801.221(c)(ii) were satisfied.
32. In the circumstances, the Respondent submits that the application is manifestly hopeless, as the Applicant did not and could not satisfy any of the relevant criteria at the time the decision was made.

33. For the Applicant it was submitted that she was not given the opportunity to do so, because the notification to her was not correctly addressed. It is not addressed in the circumstances that prevailed under s.494D.
34. It is certainly the situation that there is no evidence that the sponsoring spouse had died, and the Applicant would have continued to be the spouse of the sponsoring spouse if he had not died. There is no claim that the Applicant had suffered domestic violence, and there is no claim of any child.
35. What the Applicant submits is that the Applicant was not given the opportunity for that, to provide that information, because of the misdirection of the letter or the failure to address the letter correctly, which vitiated the whole process. The Applicant submits that notwithstanding the apparent default by the migration agent, it was the migration agent who remained the authorised recipient.
36. Mr McInerney of counsel, for the Respondent, submits otherwise. He submits that the migration agent had ceased to be the authorised recipient, and that he had ceased with effect from the lapsing of his registration on 29th July 2004. Thus he submits that the letter to the Applicant of 21st September 2004 addressed to her at her home address, as it was then known to the Department, was a correct method for the Department to notify or attempt to notify the Applicant.
37. To my mind the case turns on whether the migration agent's address at the relevant time was still the address of the authorised recipient. Mr McInerney argues that the agent ceased to be the authorised recipient, certainly from the lapsing of his registration on 29th July 2004.
38. Mr Turner for the Applicant submits that being the authorised recipient does not necessarily require a person to be a migration agent. Notwithstanding that sub-s.494D(1) refers to:

Another person who was authorised by the first person to do things on behalf of the first person that consist of or include receiving documents in connection with matters arising under this Act, or the regulations.

39. Mr Turner for the Applicant submits that whilst that definition can include a migration agent, it does not have to. And indeed, on the form of authorisation of a person to act and receive communication, it does not specify that the recipient has to be a migration agent, because the space that is provided for migration agent registration number includes the words in brackets, "if applicable."
40. He submits that a person other than a migration agent can be an authorised recipient for the purpose of s.494D. Therefore, the ceasing by Mr Johnstone of being a migration agent on 29th July 2004 did not represent the ceasing of his address of the authorised recipient.
41. In my view, the circumstances show that from an earlier date than 29th July the authorised recipient had not been working or practicing at the address given as the address of the authorised recipient. Whilst it is disputed that the statement in the decision that on 9th February 2004 the case officer was informed, on attempting to phone the migration agent, was informed that the migration agent was no longer employed by the company and that the company had discontinued dealing with the migration matters.
42. That statement is, in the decision, is submitted as not evidence of the fact. It is, to my mind, evidence that on 6th May 2004 the case officer, the delegate, had e-mailed the migration agent at the address given, saying:
- As I have been unable to contact you via the telephone, would you please advise me if you are still acting.*
43. That e-mail was marked by a delivery failure report. By 6th May 2004 there is evidence that the delegate had been unable to contact the agent by telephone. There is evidence that the e-mail could not be delivered, and in fact there is evidence that on 25th October 2004, a further e-mail was unsuccessful.
44. There is, of course, the fact that on 29th July the agent's registration had lapsed. In my view, whether or not it is necessary for an authorised recipient to be a migration agent, and it appears that it is not necessary, there is evidence that by 6th May 2004 that the person who is the authorised recipient had been uncontactable on the telephone and no

longer had the e-mail address. There is subsequent evidence that correspondence to the post office box was returned unclaimed.

45. In my view the agent had physically ceased to operate the address, which was the address of the authorised recipient. Whether or not the migration agent's registration lapsed by 29th July, in effect there was no authorised recipient at the address given to the delegate, and there was no other authorised address, or there was no other address for an authorised recipient given to the delegate, which meant that the authorised recipient had effectively abandoned the role.
46. In my view, with effect from 6th May 2004, there was no authorised recipient. The lapsing of the migration agent's registration on 29th July 2004 merely confirmed that.
47. What that then left the Department was the address at 92 Irwin Terrace, Oxley, which the Applicant had given, admittedly not for that purpose but was the last known address of the Applicant that the Department had. At that stage there was no other option open to the delegate but to write to the Applicant at that address.
48. In my view, if an authorised recipient abandons an address without providing a forwarding address, be it by e-mail or by post or by telephone, there is no authorised recipient from that date. And to my mind, that is a crucial finding.
49. In my view there was no error committed when the delegate wrote to the Applicant. I am inclined to agree that in any event the application lacks utility. In any event, as there is no error, the application should be dismissed.
50. There is an application for costs, and it is put that solicitor/client costs in respect of this matter far exceed what would normally be expected, and indeed, were about \$14,000.00. This was not, of course, a matter where the Court would contemplate making an order for costs on an indemnity basis, and no application to that effect has been made.
51. For the Applicant it is being put that this is a matter that can be dealt with along the lines of a normal scale. I note that the matter has had some history in that it has been the subject of four directions hearings,

only one of which was before me. And that would certainly have raised the costs.

52. I do consider that they are matters that I should take into account. Nevertheless, I am not of the view that I should be applying discretionary rule of thumb such as 75 per cent of solicitor/client costs. This is a matter that, whilst it involved some submissions, and very helpful submissions on the law, and perusal of some documents and wading through the legislation, it was not an overly complicated case, and indeed has been managed to be finalised in approximately two hour's hearing time.
53. It is a matter where the unsuccessful applicant should pay the respondent's costs. I propose to set that figure at \$6,000.00.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: V. Lee

Date: 5 September 2006